Filed 10/1/02 P. v. Hoskison CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROY BERT HOSKISON,

Defendant and Appellant.

F033826

(Super. Ct. No. 41742)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. John P. Moran, Judge.

Conrad Petermann, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Jeffrey D. Firestone and Robert P. Whitlock, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Roy Bert Hoskison was charged with being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)) and possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a)). He was convicted of the firearm possession and acquitted of the drug possession. In addition, it was found that he had suffered a prior serious felony conviction (strike) (Pen. Code, § 667) and had served a prior prison term (Pen.

Code, § 667.5). At sentencing, he received a total prison term of five years. Defendant appeals, claiming the trial court prejudicially erred based on: (1) its refusal to give instructions explaining his defense, (2) its failure to delete the use notes from one of the instructions given to the jury, and/or (3) its denial of defendant's request to speak at his sentencing hearing. We affirm.

FACTS

While on duty on January 12, 1999, Porterville police officer Robert Lessig was driving his patrol car southbound when he saw defendant walking the same direction on the edge of the road. Defendant was carrying in his left hand a torn dog food bag with wires protruding. In his right hand, defendant held a rifle case, with the butt of the gun extending through the broken zipper end of the case.

Officer Lessig continued down the road approximately 50 feet, made a U-turn, and returned to defendant's location. When Lessig returned, defendant walked toward a fence and placed both items against the fence. Defendant did not set anything down until Lessig approached him. Lessig checked defendant's identification and checked the weapon. The dispatcher informed Lessig that defendant was a felon. Lessig arrested defendant because he was a felon in possession of a firearm. Lessig then went to the home of Brian Tynes to determine ownership of the firearm. After this, defendant was transported to the police station.

Defendant was searched at the police station. Defendant possessed a leather case and a "purple beetle" locket attached to his belt. There was methamphetamine inside the leather case and the beetle.

Defendant told Lessig he had loaned money to one Erick and was holding the gun until Erick paid him back. Erick had not paid him back, so defendant was going to sell the gun. Defendant said he had found the leather case and purple beetle at someone's house; he was carrying them, but he had no idea what they contained. Defendant

inquired regarding the three necklaces inside the beetle and said he wanted to make sure the necklaces remained as his property.

The dog food bag and its contents weighed approximately 20-25 pounds; the gun and case weighed approximately four pounds.

Defense

William Parker, defendant's brother, purchased the gun from Erick Riddle. Parker possessed the gun on January 12 as he was walking to someone's home to sell it. Defendant was with him. Parker carried the gun at all times. Defendant and Parker took turns carrying the dog food bag. Parker saw someone down the street at the bus stop. He put the gun and the dog food bag down near a fence. He went ahead of defendant. When he left defendant, defendant was close to the bag but approximately 50 feet from the gun. Parker had obtained the leather pouch from an individual and was going to give it to his niece. He put it in the dog food bag.

Defendant testified on his own behalf. He stated that he and his brother walked to the home of Danny Williams. Defendant was going to sell his compact disc player and Parker was going to sell the gun. Parker carried the gun at all times. Williams was not home. Defendant gathered items up from the yard and put them in the dog food bag because he was afraid that people were going to steal the items in the yard. Parker and defendant left, Parker carrying the gun and defendant carrying the bag.

Parker walked in front of defendant. Defendant had to stop several times because of health problems. Parker leaned the gun up against a fence and yelled to defendant that he was going ahead to the bus stop. Officer Lessig drove by and then returned. Defendant put the bag down. Defendant did not have the gun at any time.

Officer Lessig patted down defendant. Defendant handed him some marijuana that he had in his possession. Defendant was not wearing a belt and had never seen the leather pouch or purple beetle before. Defendant never touched the gun. He told Lessig

he thought the gun had been obtained from Erick Riddle; Lessig went to talk to Brian Tynes, who lived with Riddle, before taking defendant to the police station.

Evidence was presented that a belt was not included in the bag containing defendant's personal belongings collected when he was booked into jail. Medical records were admitted to show that defendant's left arm is disabled.

Rebuttal

The prosecution re-called Officer Lessig. He stated that defendant never mentioned his brother. He also testified that defendant was wearing a belt when he was arrested and the property form utilized at the jail listed a belt as part of defendant's personal belongings.

DISCUSSION

I. Refusal to Give Instructions on Accident or Misfortune

The trial court refused defendant's request to instruct the jury on accident and misfortune as contained in CALJIC No. 4.45. That instruction provides: "When a person commits an act or makes an omission through misfortune or by accident under circumstances that show [no] [neither] [criminal intent [n]or purpose,] [nor] [[criminal] negligence,] [he] [she] does not thereby commit a crime."

The trial court also refused to give defendant's special instruction on accidental possession as a defense. It provided: "If the defendant acquired possession of an illegal item through misfortune or accident and had no intent to exercise control over the item or to have custody of it, the defendant cannot be convicted of illegal possession of the item. If you have a reasonable doubt whether the defendant acquired possession through misfortune or accident without an intent to exercise control over the item or to have custody of it, you must give the defendant the benefit of that doubt and find him not guilty."

Defendant claims the trial court erred when it refused to give these instructions on accident or misfortune. Defendant places primary reliance on *People v. Jeffers* (1996) 41 Cal.App.4th 917.

In *People v. Jeffers, supra,* Jeffers was convicted of possession of a firearm by a felon. Jeffers delivered a box wrapped in a paper bag to a gun shop. He said he was delivering the box for a friend. As the owner opened the box, Jeffers began to walk out. The store owner asked Jeffers to return to provide his name, address, and telephone number. Jeffers did so and left. After the store owner noticed the serial numbers on the gun had been removed, he contacted the Bureau of Alcohol, Tobacco and Firearms to report tampering with the serial numbers. Jeffers presented evidence to support his defense that he did not know what was in the package until after he arrived at the gun shop and he then immediately disposed of the gun. (*People v. Jeffers*, *supra*, 41 Cal.App.4th at pp. 919-922.)

On appeal, Jeffers argued the trial court erred in failing to instruct regarding his defense that he did not know what was in the package. The appellate court agreed, noting there must be a joint operation of act and criminal intent. "A person who commits a prohibited act 'through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence' has not committed a crime. [Citation.] Thus, a felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent." (*People v. Jeffers, supra,* 41 Cal.App.4th at p. 922.)

The trial court in *Jeffers* erred first because it failed to give CALJIC No. 3.30 on the union of act and general criminal intent. This instruction was critical to the jury's understanding of the defense. The error was compounded by the court's comments to the jury after the jury asked for "the legal interpretation of possession." The court reread the general possession instruction on actual and constructive possession and stated that the dispute centered on whether Jeffers had actual knowledge that the object was a pistol.

(*People v. Jeffers*, *supra*, 41 Cal.App.4th at pp. 923-924.) The comment was misleading because it allowed the jury to believe "the only issue to be decided was whether defendant had knowledge a gun was in the package even if that knowledge was not acquired until he arrived at the gun shop and even if possession was not intentional." (*Id.* at p. 924.)

In addition, the *Jeffers* trial court erred when it refused Jeffers's pinpoint instruction that stated in part: "When an ex-felon comes into possession of a firearm, without knowing that he has a firearm, and he later learns that he has a firearm, he does not automatically violate Penal Code section 12021 (a) upon acquiring knowledge." (*People v. Jeffers*, *supra*, 41 Cal.App.4th at p. 924.) We reversed Jeffers's convictions based on these instructional errors. (*Id.* at p. 925.)

The facts here are distinguishable from *Jeffers.* First, unlike *Jeffers*, the jury here was instructed with CALJIC No. 3.30, the union of act and general criminal intent. Furthermore, there was no evidence that defendant possessed the gun by accident or misfortune.[1] Defendant testified that he knew about the gun and knew it was next to the fence, but claimed he did not possess it. The court instructed concerning such a factual scenario. CALJIC No. 1.24, defining actual and constructive possession, was given, followed by special jury instruction #1 that stated, "However, proof of access to the thing, without more, is insufficient to support a finding of possession." Defendant's defense was not that he possessed the gun by accident or misfortune: his defense was that, while it could be determined that he knew about the gun and the gun was accessible to him, he did not actually possess it.

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[1] "'Misfortune' when applied to a criminal act is analogous with the word 'misadventure' and bears the connotation of accident while doing a lawful act." (*People v. Gorgol* (1953) 122 Cal.App.2d 281, 308.)

Defendant claims that his proffered special instruction would have aided the jury in determining whether defendant intended to exercise control of the weapon. CALJIC No. 1.24, defining possession, required the jury to find that defendant had actual control over the firearm, or that he "knowingly exercise[d] control over or the right to control a thing, either directly or through another person or persons."

When defense counsel placed his objection on the record regarding the court's refusal to give his requested instructions, he stated, "I would have argued that [defendant] came into possession at least of the drugs by accident. I believe there was testimony that his brother had placed the leather pouch and also the toy item into the bag and he had those by accident." Defendant did not offer any explanation at trial how the refused instructions would have aided the jury in determining his guilt on the firearm possession charge. We fail to see how these instructions would have aided the jury. The trial court did not err in refusing these instructions. Because defendant was acquitted of the drug possession charge we need not determine if these instructions were erroneously refused as they applied to those charges.

II. Inclusion of Use Notes with CALJIC No. 2.71

The jury was instructed by the trial court on admissions pursuant to CALJIC No. 2.71 as follows: "An admission is a statement made by the defendant which does not itself acknowledge guilt of a crime but which statement tends to prove guilt when considered with the other evidence. You are the exclusive judges as to whether the defendant made an admission and, if so, whether that statement is true in whole or in part. Evidence of an oral admission should be viewed with caution, and no person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of an admission."

At the close of giving the oral instructions to the jury, the court stated that the instructions would be available in written form in the jury room. The jury was instructed to disregard any deleted part of the written instructions.

The written instruction for CALJIC No. 2.71 given to the jury was a photocopy of the instruction as it is set forth in the California Jury Instruction book. In addition to the instruction itself, the photocopy contained the entire use note and a portion of the comment as follows:

"USE NOTE

"This instruction is limited to a definition of an admission for use where defendant's statement which has been received in evidence could not constitute a confession.

"There is no sua sponte duty to give a cautionary instruction at the penalty phase of a capital trial. It should however be given if requested by a defendant. (*People v. Livaditis* (1992) 2 Cal.4th 759, 784 ….)

"COMMENT

"See Comment to CALJIC 2.70.

"Contrary to *People v. La Salle* (1980) 103 Cal.App.3d 139, 149-152 … (disapproved on other grounds by *People v. Kimble* (1988) 44 Cal.3d 480, 496-498 … cert. denied 488 U.S. 871 … are several cases holding that the court has a sua sponte duty to give the instruction whenever a pretrial statement of a defendant is received that tends to establish guilt when considered with the remaining evidence in the case, regardless of whether the out of court statement is technically an 'admis-"

Defendant claims he was prejudiced by the inclusion of this extraneous material in the copy of CALJIC No. 2.71 given to the jury during its deliberations. In particular, defendant argues that the comment section which stated that his pretrial statement, "when considered with the remaining evidence in the case," tended "to establish his guilt" suggested to the jury that the judge had selected this instruction because he had concluded that, collectively, defendant's out-of-court statement plus the "remaining evidence in the case" tended to establish his guilt. Defendant characterizes the extraneous material as an impermissible judicial comment on the evidence and the guilt of the defendant. Defendant notes that at the top of the instruction is the notation "Rqst

by CRT." which would indicate to the jury that the court found on its own initiative that the instruction was applicable.

Although trial courts are authorized to comment on the evidence, they may not suggest to the jury that they return a particular verdict. (*People v. Cook* (1983) 33 Cal.3d 400, 412-413.) "The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 766.)

We have found no cases, nor have the parties cited any cases, discussing the type of error alleged here. It is an error somewhat akin to pure instructional error, yet not completely aligned with such error. It is distinguishable from pure instructional error on several points. First, the trial court's oral instructions to the jury were correct and did not include the language defendant now asserts was erroneous. Although the written instructions were provided to the jurors, we do not know if they found the need to review the written instructions during their deliberations. Also the extraneous material in the written instruction is denoted as not part of the actual instruction, reflected by the labels of "USE NOTE" and "COMMENT" appearing before the questionable material. Thus, it is likely the jurors never paid any attention to the use note and comment and, if they did, they were adequately informed these items were extraneous.

In any event, the comment portion of the instruction was not an improper judicial comment on the evidence. The comment states that there is a dispute when the instruction must be given and some cases hold that it must be given "whenever a pretrial statement of a defendant is received that tends to establish guilt when considered with the remaining evidence in the case." In the correctly given portion of the instruction, the jurors was explicitly advised they were the exclusive judges of whether the defendant had made an admission. Officer Lessig testified to a potential admission made by the defendant. The comment did not remove the jury's power to determine if such an

admission had been made. When read in context, the comment merely informed the trial court that when this type of evidence is received, whether true or not, the instruction should be given. The comment was not an improper judicial comment on the guilt of the defendant.

We note that although defendant argues that it was error for the written instruction to include the extraneous material, he argues prejudice only when combined with the alleged instructional errors discussed previously under issue I above. As previously discussed, defendant's other claims of instructional error have no merit. It is not reasonably probable that in the absence of the claimed misdirection of the jury the defendant would have obtained a more favorable outcome. (*People v. Breverman* (1998) 19 Cal.4th 142, 178.)

III. Defendant's Right to Speak at Sentencing

Defendant was allowed to proceed as his own attorney for the limited purpose of filing a new trial motion. Prior to sentencing, defendant orally made a motion for new trial. At the conclusion of this motion, defendant stated that, if the court determined it would proceed to sentence him, he wished to make a further statement and raise objections on the record. The trial court denied defendant's motion for new trial.

The court proceeded to sentencing. The court asked for comments from the prosecutor and defense counsel. Each made comments regarding sentencing. The court then pronounced sentence. At the close of sentencing the defendant asked that he be permitted to read "this other statement real quick." The trial court denied defendant's request.

Defendant contends that the trial court improperly refused to permit him to personally and fully address the court during his sentencing hearing as required by statute and federal and state Constitutions.

Penal Code section 1200 provides: "When the defendant appears for judgment he must be informed by the Court, or by the Clerk, under its direction, of the nature of the

charge against him and of his plea, and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him." Penal Code section 120l states that legal cause includes insanity, good cause in arrest of judgment, or cause for a new trial.

Defendant relies on *In re Shannon B.* (1994) 22 Cal.App.4th 1235 to support his position that in addition to the rights given in Penal Code section 1201 the defendant has the right to personally address the trial court at sentencing. The court in *Shannon B.* discusses at some length the right of allocution in determining that a minor does not have such a right in juvenile proceedings. It stated that, in addition to the rights set forth in Penal Code section 1201, a defendant had the right to personally present information in mitigation of punishment. The court's analysis on the rights of an adult criminal defendant was not necessary to its conclusion regarding a juvenile's rights and was dicta.

Regardless of whether a defendant has the right to personally address the court on the question of punishment or any other related question before the court at sentencing, defendant has failed to show how he was prejudiced. Defendant does not make a factual argument but merely states that we do not know what defendant would have said or what the court's reaction would have been; thus he claims it is impossible to conclude beyond a reasonable doubt that the refusal to allow him to speak did not make any difference. Defendant attempts to shift the burden on appeal and argues it is the prosecution's duty to establish beyond a reasonable doubt that the court's sentencing decision would have been the same if defendant had been allowed to speak his piece. "'One asserting prejudice has the burden of proving it; a bald assertion of prejudice is not sufficient.'" (*People v. Sandoval* (1992) 4 Cal.4th 155, 174.)

DISPOSITION

The judgment is affirmed.

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VARTABEDIAN, Acting P. J.

WE CONCUR:

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HARRIS, J.

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WISEMAN, J.